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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1606

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

PETITIONERS,

v.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

REPLY BRIEF FOR PETITIONERS

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In Re: Hortonville Joint Sch. Dist. #1 et al v. Hortonville Education Assn. et al
(U.S. Supreme Court, Oct. Term, 1974, No. 74-1606)

State of Minnesota
County of Hennepin

AFFIDAVIT OF SERVICE

Mark Cullen *of the City of Minneapolis, County of Hennepin, State of Minnesota, being duly sworn, says that on the* 12 *day of* February, 1976, *he served the* Reply Brief of Petitioners *in the above entitled case on the following attorney(s) by enclosing two copies of same in a properly addressed envelope for shipment by:* ☒ *Mail* ☐ *United Parcel* ☐ *Personal Delivery*
Robert H. Friebert, Suite 440, 710 N. Plankinton Ave., Milwaukee, WI 53203

Subscribed and sworn to before me this 12 *day of* February, 1976

(Signed) Mark Cullen

Ruth A. Blass

RUTH A. BLASS
Notary Public, Hennepin County, Minn.
My Commission Expires April 15, 1978.

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REPLY BRIEF FOR PETITIONERS

SUMMARY OF ARGUMENT

The Wisconsin Supreme Court, relying on *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), concluded that the petitioner School Board was prohibited from choosing among admittedly lawful responses to a prohibited strike by its employees. The Wisconsin court expressly disclaimed any suggestion that the elected Board members had acted as other than

"dedicated public servants" trying to fulfill a duty to keep the schools open and staffed with competent teachers. Nonetheless, the court below ousted the Board from its traditional and statutory role as employer. A *de novo* proceeding before a state trial judge was created to determine whether there was a "more reasonable" response to the illegal strike.

This case does not involve a pecuniary interest or personal bias. Respondents' reliance on *Taylor* v. *Hayes*, 418 U.S. 488 (1974), to show that the school board members were biased towards discharge is contrary to express findings of the Wisconsin courts. Moreover, there are no allegations of personal animosity akin to that found in *Taylor* v. *Hayes*. That the Board refused to abdicate its statutory responsibilities and sought to accurately determine which teachers were participating in the illegal strike by complying with the procedural dictates of *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), cannot be the basis of inferring a disqualifying bias.

The Wisconsin court erred in concluding that the Due Process clause required a decisionmaker which did not have a policy-making responsibility in the collective bargaining process. The Due Process clause as construed by this Court has not required—and should not require—that public employee decisions ultimately be made by political and policy neuters.

Here neither respondents nor their parent union, the National Education Association, as amicus, argue that the Wisconsin Supreme Court correctly construed the Due Process clause. Rather, both assert that this case merely concerns employee disciplinary proceedings in the abstract, and they assert the Wisconsin court really held the petitioners "penalized" the teachers by discharging them. This assertion obviously overlooks the fact that the termination notices effectively stated that any teacher would be replaced *only* if he or she continued to strike unlawfully.

Having erroneously posited that the striking teachers were penalized, respondents next assert that the School Board's bargaining conduct was a "mitigating" circumstance in selecting the proper "penalty." Thus, respondents argue, the School Board cannot constitutionally decide to discharge them "because a truly impartial tribunal might well decide that the negotiating conduct of the Board was such as to justify a less severe discipline than discharge." (See NEA Br., p. 25)

The teachers' penalty argument, if accepted, would effectively oust school boards from their traditional and statutory role and, in the process, would insulate unlawful strikes from timely response. Wisconsin law already provided procedures—ignored by respondents—for determining if petitioners bargained unlawfully or otherwise violated respondents' rights. Thus, the principal effect of respondents' argument would be to substitute the courts, and ultimately the Federal courts, as the final arbiters of public employee administration.

The Due Process clause does not require that every government action that affects "property" interests be taken only after a complete trial-type proceeding. Here the government's interest was in promptly reopening the schools. The striking teachers obviously support time-consuming procedures because such procedures effectively reduce the options which the Legislature has conferred upon the Board for quickly dealing with the strike. However, Respondents' due process interests are limited to procedures that protect against an erroneous taking of property. Here their "prop-

erty" interest was conditioned on the absence of legal "cause." Participation in the strike, under Wisconsin law, constituted "cause" for termination. The teachers admitted such conduct during a procedurally fair hearing. At that point the Due Process clause was satisfied; the teachers have no constitutional right to continue illegally striking and to retain their employment.

ARGUMENT

I.

RESPONDENTS HAVE FAILED TO SHOW THAT PETITIONERS' ACTION IN THIS CASE WAS TAINTED BY CONSTITUTIONALLY IMPERMISSIBLE BIAS.

As respondents and their amicus, the National Education Association (NEA), implicitly recognize in their briefs, a crucial question in this case is whether the School Board and its members suffered from a constitutionally impermissible bias which taints the proceeding that led to respondents' discharge. The ultimate conclusion that the School Board "was not an impartial decisionmaker in a constitutional sense" (A. 253) must be supported by a finding that petitioners were in some sense biased.

Respondents now argue that petitioners should be found guilty of actual bias, the kind of personal hostility or pecuniary self-interest that infected the proceedings in *Taylor* v. *Hayes*, 418 U.S. 488 (1974), and similar cases. The simple answer to this argument is, of course, that respondents failed to prove such bias and the Wisconsin courts expressly found that it did not exist. As stated by the Wisconsin Supreme Court, "This is not to suggest, of course, that the board members were anything but dedicated public servants, trying to provide the district with quality education while still keeping within its limited budget." (A. 253)

Thus, actual bias is not an issue here. As this Court first said a generation ago and reaffirmed only last Term in *Withrow* v. *Larkin*, 421 U.S. 35, 55 (1975), "Without a showing to the contrary, state administrators, 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.' *United States* v. *Morgan*, 313 U.S. 409, 421 (1941)."[1]

Amicus NEA attempts to establish unconstitutional bias by still another theory not adopted by the Wisconsin Supreme Court. Petitioners were biased, NEA contends, because *respondents* sought to make petitioners' misconduct an issue in the discharge and replacement process. By not allowing evidence on this issue, but merely allowing an offer of proof, the School Board allegedly established its own unconstitutional partiality.

There is an inherent danger in this argument which was recognized in *Taylor* v. *Hayes*, namely, that a school board or other agency "can be driven out of a case" by any party sufficiently astute to *allege* the presence of such issues. See 418 U.S. at 503 n. 10, 530. Here, respondents' allegations and offer of proof did not persuade the Wisconsin courts that petitioners suffered from actual bias. The blanket rule proposed by NEA would result in wholesale disqualification of governmental agencies accused of "misconduct" and should be rejected.

---

[1]See also, *Sacher v. United States*, 343 U.S. 1 (1952), and *Ungar v. Sarafite*, 376 U.S. 575 (1964), discussed in *Taylor v. Hayes*, 418 U.S. 506 (1974), which apply a presumption of impartiality to judges involved in direct contempt situations, absent convincing evidence of personal animus.

In addition, it is important to note that the "misconduct" of which the Board was accused involved alleged collective bargaining improprieties over which the Wisconsin Employment Relations Commission, not the Board, has jurisdiction. If petitioners were guilty of the misconduct alleged, the WERC is empowered to remedy the unfair practice, a remedy which respondents failed to invoke. Since the WERC has not acted to the contrary, the School Board must remain free to proceed with the discharge and replacement process. Otherwise, respondents' refusal to file a complaint in the proper forum brings government to a standstill!

Despite the attempt by respondents and the NEA to manufacture an issue of actual bias not found by the Wisconsin courts, it seems clear that this case, like *Withrow* v. *Larkin*, involves solely the issue of whether the School Board's multiple statutory duties create an unconstitutional risk of institutional bias. Even the offer of proof and the request to substitute bargaining for the discharge proceedings, made by respondents at the pretermination hearing, addressed the institutional relationship between the Board and the Union, not any personal contact or conflict between Board members and any teacher. The Wisconsin court clearly based its decision on these institutional relationships. Concluding that *Morrissey* v. *Brewer* requires a "neutral and detached" decisionmaker, the Wisconsin court concluded that the Board failed that test because it was "not uninvolved in the events which precipitated decisions they were required to make."

What the Wisconsin court and respondents failed to appreciate, however, is that the standard applied to parole

revocation proceedings in *Morrissey* was based upon this Court's thorough examination of "the function of parole in the correctional process," 408 U.S. at 477, including analysis of the respective interests of the parolee and the State.

Respondents implicitly recognize that *Morrissey* does not require displacing a decisionmaker because of its policy orientation. Respondents further recognize that, even as to their "mitigation" argument, the application of *Morrissey* depends on personal bias. Thus, at page 46, note 26, of their brief, respondents state their concern that the parole officer in *Morrissey* personally misled or was personally unreasonable to the parolee.[2] Yet respondents argue here that the Board, as a seven-member elected institution bargaining with a union representing teachers, was biased *per se*, merely because the Board had an institutional responsibility in the collective bargaining process.

Morrissey presented entirely different facts. None of the procedures mandated in *Morrissey* was to occur until the parolee was actually arrested. 408 U.S. at 485. The "preliminary hearing" from which the parole officer was personally disqualified would not in the least be impaired or delayed by substituting another, easily available parole official.

Moreover, this Court in *Morrissey* specifically stated, "Obviously a parolee cannot relitigate issues determined against him in other forums," and further stated that if in fact the parolee had admitted violations which would warrant revocation under state standards, "that would end the matter." 408 U.S. at 490. In this case, the Hortonville teachers sought to justify their illegal strike by alleging bargaining improprieties before the wrong forum, they later admit-

[2]This Court itself stated in *Morrissey* that the danger was "personal friction." 408 U.S. at 486, n. 14.

ted in both the Wisconsin courts and this Court that they did strike, and the Wisconsin Supreme Court held (and respondents now admit) that dischcarge for striking is reasonable under state standards. See Resp. Br., p. 18. *Morrissey* requires no more.

Finally, in *Morrissey*, this Court stated there was no State interest in not affording the procedures mandated. As explained in petitioners' main Brief, the interests of the State and the general public here support the logical grouping of functions in an elected School Board and the retention of fair but efficient procedures whereby the Board can fulfill its primary obligation to operate the public schools.[3] In

[3]Other courts that have balanced the interests of striking employees in expanded procedures and the government's interest in resuming its functions have determined that the government's interests dominate. *E.g., Rockwell v. Board of Education*, 393 Mich. 616, 227 N.W.2d 736 (1975), *appeal docketed*, 44 U.S.L.W. 3207 (No. 75-466), where the court stated at 227 N.W.2d 744:

> "When public employees strike, the public employer must, like a private employer, be able to hire substitute employees so that the public business is not interrupted. In order to hire competent replacements, it may be necessary for the public employer to offer permanent employment and thus displace strikers. Where essential services have been suspended, the hiring of replacements often cannot await time consuming adjudicatory processes.
>
> "The prodominant interest secured by predisciplinary hearings, as advanced in *Arnett, supra*, is protection against removal of the wrong person and, assuming ultimate employee vindication, protection against interim financial deprivation.
>
> "The possibility of removal of a non-striker is minimized when, as here, the school board gives each striking teacher personal notice of the opportunity to return to the classroom before disciplinary action is taken. While on strike, a teacher receives no compensation; striking teachers do not suffer additional interim financial deprivation when disciplined."

See also the cases cited at pp. 17-18 of Pet. Brief and *Lake Michigan Community College Federation of Teachers v. Lake Michigan Community College*, 518 F.2d 1091, 1098-99 (6th Cir. 1975), *pet'n for cert. filed*, 44 U.S.L.W. 3351 (No. 75-698) (reversing a determination that the employer could not discharge illegal strikers because it was not a constitutionally impartial decisionmaker. The court said the college could correctly identify the strike participants, its decision was reviewable in the courts, and allegations of or defenses premised on employer misconduct were to be determined by the state labor agency). See also *Burnley v. Thompson*, — F.2d —, 91 LRRM 2033 (5th Cir. 1975).

concluding that the School Board was a constitutionally impermissible tribunal, the Wisconsin Supreme Court has failed to give these factors appropriate constitutional weight. It has applied the due process clause in a rigid and stultifying manner, forgetting that, "The incredible variety of administrative mechanisms in this country will not yield to any single organizing principle." *Withrow* v. *Larkin*, 421 U.S. at 55.

II.

RESPONDENTS' ASSERTION THAT THE DISCHARGES WERE A "PENALTY" IS AN ATTEMPT TO RECAST THE OPINION BELOW AND OUST THE BOARD FROM ITS ROLE AS EMPLOYER IN ORDER TO GAIN AN EFFECTIVE RIGHT TO STRIKE.

Neither Respondents nor their amicus argue that the Wisconsin court correctly construed the Due Process clause. Both attempt to recast the opinion and assert that the Wisconsin court was not concerned with the prohibited strike but only with the "penalty" to be imposed on the striking teachers. Respondents, of course, do not argue that they cannot be terminated for participating in the illegal strike since the court below expressly held that discharge and replacement was a lawful response to the strike under State law.

Respondents' penalty argument asserts that: (1) because State law did not require the Board to terminate and replace the teachers engaged in the prohibited strike, discharge is a "penalty"; (2) the teachers cannot be "penalized" unless their claimed "mitigating" facts (collective bargaining "misconduct") are considered; (3) only a different decisionmak-

er can impartially evaluate the claimed "mitigating" facts.

These assertions ignore the Wisconsin court's actual holding, and disguise Respondents' real goal in this case: to oust the elected Board from fulfilling its responsibility to reopen the schools.

A. Respondents Seek To Oust the Board of Its Policy-making Role.

Amicus NEA argues that a refusal to bargain by the Board, though not a justification for striking under State law, makes the discharge for striking unconstitutional, even though the refusal to bargain was not proved nor even pursued before WERC, the proper forum.

Using the label "penalty," NEA then asserts that when a claim of a refusal to bargain is made before the Board, the Board becomes incapable of taking action upon its policy to reopen the schools with replacements, because the discharge proceedings needed to implement the policy allegedly involve the union's accusation of misconduct by the Board. NEA protests (NEA Br., pp. 22, 31) that it does not in this case attack the Board's interest as an employer, nor its policy, but is concerned only about specific, case-by-case bias. However, NEA simultaneously attacks the Board's policy decision not to seek a discretionary injunction, and respondents attack (Resp. Br., p. 16) the Board's policy decision to abandon sporadic attempts to operate the schools with substitutes. (A. 192, 232)

This case does not hinge upon a particular, personal bias; the Wisconsin holding is not narrow. The Wisconsin court stated that a *de novo* hearing was necessary anytime the Board was in an "adversary position." (A. 257)

In this case, while the claim of unfair bargaining was

made before the Board by the teachers (and was labeled by the teachers, not the Board, as connected with striking), only a *policy* orientation, not bad faith bargaining, was alleged in the amended complaint herein. See the Amended Complaint, A. 132. While respondents' brief contains numerous assertions that the Board's bargaining conduct was improper or unlawful, none of these assertions is supported by a reference to any part of the record. These teachers have never sought review of the Board's bargaining conduct before the WERC, the specialized State agency expressly authorized to hear and remedy allegations of improper bargaining. Indeed, counsel for the teachers, when reminded at the pretermination hearing of the jurisdiction of the Wisconsin Employment Relations Commission, eschewed any interest in filing a prohibited practice complaint challenging the Board's bargaining conduct. (A. 97)

Respondents' actual complaint is that the Board did not accede to their bargaining demands: "The teachers submit that a job action was the only practical method to obtain intensive bargaining with this unresponsive, slow moving School Board." (Resp. Br., p. 17)

That clam has been and will always be the asserted justification for any public employee strike, particularly if making it will render the public employer powerless to replace striking employees.

B. Characterizing These Discharges As A "Penalty" Is Disingenuous and Cannot Change the Record or Wisconsin's Statutory Prohibition of All Public Employee Strikes.

This litigation began after the Board terminated the striking teachers upon their continuing refusal to return to

work. Instead of accepting the Board's offers of reemployment (A. 41), the teachers sought to enjoin the Board from hiring replacements on the theory that they had the right to strike if they struck in the belief that the Board had not bargained properly. (A. 6-37) The trial court disagreed:

> "The law in Wisconsin on this point is clear and succinct as set forth in Wisconsin Statute 111.70(4)(1) and I quote: 'Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employee and such strikes are hereby expressly prohibited.'
>
> "That statute does not say nor has any Court in this state interpreted the statute to provide that strikes are expressly prohibited except when there is just cause. The legislative policy on this point is clear. Section 111.01(4) of the Wisconsin Statutes provides: 'It is the policy of this state in order to preserve and promote the interests of the public, the employe, and the employer, alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated.
>
> * * *
>
> "It is the further argument of the plaintiffs that the chain of cause and effect in this case is substantially as follows: That the defendants committed certain acts; those acts of defendants caused the strike; the strike caused the discharges and termination of employment notices to be sent on April 2nd, 1974. But, as I previously indicated, Wisconsin law does not give validity to the provocation—justified strike theory." (A. 124-125)

The Court repeated that conclusion in granting judgment for the School Board. (A. 195)

On appeal the Wisconsin Supreme Court did not upset these conclusions. The Court simply stated:

> "From the statutes, the cases cited, and the contract, we conclude the school board did have the power to discharge the teachers who engaged in the prohibited strike." (A. 239)

The teachers argue that since discharge for participating in the illegal strike is not automatic, discharge is a "penalty." It is true that state law did not *require* the Board to respond to the strike by terminating and replacing strikers. It is also true that a government has no interest in discharging striking employees unless it is going to replace them, since the government cannot operate without employees.

Characterizing discharge as a "penalty" has no analytical value. All discharges can be called a "penaty." Discharge is normally a response to past conduct such as insubordination, poor work or misconduct. The striking teachers here were not discharged for past conduct. Indeed, the reverse is true: the "mitigation" the teachers alleged was a *continuation* of their illegal strike as a response to alleged *past* conduct by the Board.

The respondents were simply advised that if they would not work the School Board would hire someone who would. The termination notices specifically stated that replacements were being sought and invited the teachers to contact the superintendent if they wish to continue their employment with the district. (A. 41)

Respondents also suggest that discharge is a "penalty" because another decisionmaker may have chosen a completely different course of action to cope with the prohibited strike. They quote from *Joint School District No. 1, City of*

Wis. Rapids v. *Wis. Rapids Educ. Assoc.*, 70 Wis. 2d 292, 234 N.W.2d 289 (1975), and suggest that the Board could have sought an injunction to open the schools. In *Wis. Rapids* an injunction was granted when the School Board showed that schools were closed and that there was "no assurance that the strike would come to an early end." 234 N.W.2d at 301. However, the Wisconsin Rapids teachers ignored the injunction and continued their illegal strike. *Id.* at 294.

Amicus NEA, implicitly conceding the tendency of public employees to ignore judicial return to work orders, confidently states: "Surely the state judiciary is not impotent to enforce its own decrees." (Br. of NEA, p. 2). However, in *In Re Webb*, — Cal. App. —, 91 LRRM 2018 (No. 1 Crim. 14518, Oct. 7, 1975), the Superior Court clerks struck, effectively halting the court's activities. The clerks disobeyed an injunction against the illegal strike and were jailed for contempt. On a writ of habeas corpus a divided appellate court reversed, holding that the clerks had a constitutional right not to work and thus the public employer's only recourse was to terminate and replace them because they had quit.

Whatever the merits of trying to reopen schools by jailing or fining illegally striking teachers, as opposed to hiring permanent replacements, the fact remains that the School Board here had legal "cause" to dismiss the teachers for participating in the prohibited strike. (A. 239) Respondents' argument that the Board could have sought an injunction only underscores that the Board had to decide which admittedly lawful response would fulfill its "duty to keep the schools open and to staff them with competent teachers." (A. 255)

III.

THE DECISION BELOW RESTS UPON A MISREADING OF *MORRISSEY* v. *BREWER* AND NOT UPON STATE LAW GROUNDS.

Had the court below not misread *Morrissey v. Brewer*, 408 U.S. 471 (1972), it would not have concluded that "the board was not an impartial decisionmaker in a constitutional sense," (A. 253) and it would not have sustained the teachers' contention that Wis. Stat. §118.22(2), "which gives the school the exclusive right to hire and fire, is unconstitutional in that it denies due process." (A. 256) Wisconsin law does not require a hearing prior to the dismissal of a teacher. See Wis. Stat. § 118.22(2). Any need for the hearing held by the School Board here, as well as its purpose, emanates from *Board of Regents v. Roth*, 408 U.S. 564 (1972), not Wisconsin law.

If allowing the School Board to choose among admittedly lawful responses to an illegal strike does not violate the Due Process cause, there would be no need for a *de novo* hearing to determine whether there was a "more reasonable" course of action. (A. 255) Absent such a hearing respondents would not be contending here that discharge must be reasonable under all the circumstances.

At pages 18-19 of their brief respondents state:

> "There is no dispute that discipline may be imposed upon striking municipal employees. There is also no dispute that discharge may be one of the penalties allowed. In the absence of judicial intervention, there is no automatic penalty for striking, and, in fact, any penalty imposed must be reasonable under all the circumstances. *Durkin v. Board of Police and Fire Comm.*, 48 Wis.2d 112, 180 N.W. 2d 1 (1970)."

At page 25 respondents assert that: "Section 62.13(5)(i) of the Wisconsin Statutes allows *de novo* judicial review of the reasonableness of disciplinary proceedings against police and fire employees, including *de novo* review of the reasonableness of any penalties imposed." Again, *Durkin* is cited.

Respondents seriously misread *Durkin*. After an illegal strike by firemen had ended, one of the 270 strikers was suspended. He sought review and the court in *Durkin* found a denial of due process in the failure to notify the fireman that the hearing would consider whether he violated department rules. The court then stated:

> "No court of review has the means of determining whether the Board would have imposed the same penalty had it found the respondent in violation of only two of the violations charged in the complaint." 48 Wis. 2d at 213, 180 N.W.2d at 6.

The matter was remanded to the Police and Fire Board for further proceedings, if any. The court suggested that the Board consider: (1) a strike amnesty agreement; (2) that the Board itself decided not to proceed against any of the striking firemen; and (3) that the elector's complaint which initiated the proceeding was filed against only one fireman.

Not only does *Durkin* have nothing whatsoever to do with teachers, it reminds that in a common law certiorari proceeding an arbitrary or unreasonable result will not be affirmed. There is no dispute that teachers here could have sought review in such a proceeding.

If, as respondents assert, the lawfulness of the Board's prior bargaining conduct was relevant to the discharge proceeding, then the Board's refusal to admit the evidence proffered by the teachers' counsel at the hearing would have

been an error correctible by the courts in a common law certiorari proceeding, which under Wisconsin law could determine:

> ". . . (1) Whether the board kept within its jurisdiction; (2) whether it proceeded on correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and reresented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question." *State ex rel. Ball v. McPhee* (1959), 6 Wis. 2d 190, 199, 94 N.W.2d 711. *See also State v. Goulette* (1974), 65 Wis. 2d 207, 222 N.W.2d 622. (A. 255)

In this case, the Wisconsin Supreme Court approvingly cited *Millar* v. *Joint School District*, 2 Wis. 2d 303, 86 N.W. 2d 455 (1957), in stating that the petitioners could dismiss the teachers for participating in the strike. *Millar* reviewed prior Wisconsin cases and confirmed that a School Board could dismiss a teacher for failing to perform his duties. Also cited with approval was *Richards* v. *Board of Education*, 58 Wis. 2d 444, 206 N.W.2d 597 (1972), where the court said that a government employer's plenary power to terminate a public employee is limited only as provided by statute or a valid contract. *Id.* at 451-52. None of these cases suggests that Wisconsin law provides that an illegally striking teacher can be terminated and replaced only if a court ultimately agrees with the employer's choice of "penalty" in a *de novo* proceeding.

The Wisconsin court here did not decide that existing review procedures were inadequate because respondents were entitled to more expansive procedures under State law. Certiorari review and review by the Wisconsin Employment

Relations Commission, neither of which respondents sought, were declared inadequate under the Due Process clause of the Federal Constitution as interpreted by the Wisconsin Supreme Court.

CONCLUSION

The Wisconsin Supreme Court decided that the petitioners, acting as dedicated public servants, lawfully responded to a prohibited strike that demanded immediate attention. However, the Wisconsin court held that the "process due" respondents under this Court's prior decisions included a decisionmaker that did not have a collective bargaining responsibility.

Before this Court, neither respondents nor NEA argues that the Wisconsin Supreme Court's decision is correct. Rather, they agree with petitioners that this Court's prior Due Process decisions have carefully avoided limiting the exercise of lawful discretion by government officials and have focused on the adequacy of fact-finding procedures. Thus, they ignore the Wisconsin court's opinion and make the strained "penalty" argument in an attempt to show that the petitioners could not impartially determine certain claimed "mitigating facts."

Respondents concede that their conduct, regardless of their intent, constituted legal "cause" for discharge under State law. Respondents do not deny that they were accorded a record hearing at which the petitioners could impartially determine whether respondents had engaged (and were continuing to engage) in that conduct. At that point the Due Process clause was satisfied. There was no risk that the teachers would be deprived of their employment by mistake

or in violation of their legal rights. The teachers may have hoped that the Board would not discharge them for striking. They may even have unilaterally expected that the Board would not seek to reopen the schools with replacements. However, those expectations are not "property" interests protected by the Due Process clause:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it." *Board of Regents v. Roth,* 408 U.S. at 577.

For the foregoing reasons the judgment of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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